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No.

In the Supreme Court of the United States

October Term, 1983

MARSHALL L. PECINA,

Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY and BROTHERHOOD OF RAILWAY,
AIRLINE AND STEAMSHIP CLERKS,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. Is the intent of Title VII to eliminate racial discrimination in employment subverted when the lower courts, in determining if disparate treatment shows discrimination, set a new standard requiring that a precisely identical disciplinary situation be found, which is contrary to the existing standard of examining comparable types of disciplinary problems and the severity of discipline imposed as set forth in prior Supreme Court cases?
2. Did Petitioner meet the ultimate burden of showing discrimination when the Respondent can provide no legitimate business justification for imposing harsher punishment on a minority who was active in civil rights, who had EEOC charges pending when he was terminated, and who allegedly was found to have acted improperly on one (1) day, while Respondent always imposed lesser or no discipline on non-minority employees who engaged in more severe infractions and who remain presently in the employment of the Respondent?

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MARSHALL L. PECINA,

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**THE ATCHISON, TOPEKA & SANTA FE RAILWAY
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AIRLINE AND STEAMSHIP CLERKS,**

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Marshall L. Pecina, your Petitioner, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is printed in full as Appendix A. The Memorandum and Order of the United States District Court for the District of Kansas is printed in full as Appendix B to this Petition.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Tenth Circuit was entered November 21, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant portions of 42 U.S.C. § 2000e are set forth in Appendix C hereto.

STATEMENT OF CASE AND FACTS

Original jurisdiction in the federal courts for this Title VII civil rights action was granted by 28 U.S.C. § 1331. Petitioner Marshall L. Pecina is a Spanish-surnamed person who was hired by Respondent Santa Fe in 1951. Petitioner was the first and only Spanish-surnamed person to work in a crew clerk's office on a regular basis in the Argentine, Kansas Division of Respondent. Testimony was given that Petitioner was active in promoting civil rights at Santa Fe in the mid-1970's. Upon receiving notice that his job was being abolished on June 12, 1974, Petitioner filed charges of discrimination with the EEOC on June 13, 1974. Those charges remained pending until after Petitioner's discharge on November 14, 1977. In the spring of 1977, Petitioner's brother, Don Pecina, was hired by Santa Fe. As a crew clerk, Petitioner was required to call his brother for assignments on certain job positions, as were the other crew clerks who held the same position. Although Petitioner was originally

charged with improper placement of his brother on four (4) days—July 11, 1977, July 18, 1977, August 23, 1977 and September 8, 1977—the investigation conducted by Respondent Santa Fe exonerated Petitioner for three (3) of the four days charged. Don Pecina worked yard jobs on July 18, 1977 and August 23, 1977, and crew clerks are not required to call persons for yard jobs since they are posted on a bulletin board. As for September 8, 1977, testimony was given that Don Pecina had releases in on that day which would allow him to move about to other positions. As for the questionable one (1) day, July 11, 1977, Petitioner testified that he was on duty that day and that he did not recall placing Don Pecina. Don Pecina testified that he was called to work and he worked a full day. Testimony was given that business records had been destroyed which would have cast light on that one day in question.

The trial transcript is filled with many examples of omissions, i.e., two persons appearing for the same job, and persons called out of the line of seniority or sequence. Fred Miller, witness for both Petitioner and Respondent, testified that over a six-month period approximately five hundred (500) claims of various types were filed, although not all involved crew clerks. The trial transcript lists the many instances of intentional violation of rules by other employees. Both John Sawka and Rodney Lee Allan were discharged for intentional acts of wrongdoing, and both testified that they returned to their positions and worked without restrictions. Mr. Sawka was found to have stolen merchandise out of a grocery warehouse. Another employee, Arlevia Shields, testified that she sought a position and was denied the position, for her white supervisor, Josephine Rayback, sought to permanently place Ms. Rayback's niece, who was junior in senior-

ity to Ms. Shields. As a result, the white supervisor was not terminated, but was moved to a department other than the one in which Ms. Shields worked. Evidence was given that a large number of time cards were falsified. Fred Miller, who had been the chief crew clerk, testified that a few crew clerks had illegally placed persons. Respondent introduced into evidence their Exhibit Z-1, a copy of which is attached hereto as Appendix D, which lists the employees who were removed from service, who were reinstated, and what the circumstances were. In reviewing the Exhibit Z-1, attached hereto, it is evident that many employees were involved in violation of federal law by theft of interstate shipment, theft of company property and other acts of misconduct, but are still presently on active duty with Respondent Santa Fe. Only one (1) other crew clerk had been terminated for a limited period of time, and that person was reinstated. Testimony was given that Santa Fe was lenient in its discipline; one fellow crew clerk testified that but for his race, Petitioner's behavior would not have been an issue. Respondent's Assistant to the Superintendent testified that there was no set of disciplinary rules on punishment and that charges of misconduct were handled on a case-by-case basis. Fred Miller, chief crew clerk, called to testify for both Petitioner and Respondent, testified that he was approached on two (2) occasions by Respondent Santa Fe's officials to obtain some kind of derogatory information on Petitioner Marshall L. Pecina. On cross-examination, Mr. Miller did not retract that damaging information against his employer. During the trial, evidence was given that Respondent breached the labor agreement which required that Respondent give specific charges within twenty (20) days from the date it had factual knowledge of an incident to be investigated. Since Petitioner received charges in mid-September 1977, well

after the only day in question of July 11, 1977, it is clear that the charge of July 11, 1977 should not have been brought in the first place. Following the discharge of November 14, 1977, Petitioner filed a second amended charge of discrimination on November 17, 1977. On November 29, 1978, the EEOC issued a determination that there was probable cause to believe the charge of discrimination and retaliation.

REASONS FOR GRANTING REVIEW ON WRIT OF CERTIORARI

I.

Certiorari Should Be Granted Because the Intent of Title VII to Eliminate Racial Discrimination in Employment Is Subverted When the Lower Courts, in Determining If Disparate Treatment Shows Discrimination, Set a New Standard Requiring That an Identical Disciplinary Situation Be Found, Which Is Contrary to the Existing Standard of Reviewing Comparable Types of Disciplinary Problems and the Severity of Punishment Imposed As Set Forth in Prior Supreme Court Cases.

Pursuant to Supreme Court Rule 17, certiorari should be granted when there is rendered a conflict in decisions by federal courts of appeal, for Supreme Court cases have never required evidence of an identical situation to prove disparate treatment.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the court stated that, "Discriminatory preference for any group is what Congress prescribed." In *McDonnell-*

Douglas Corp. v. Green, 411 U.S. 792 (1973), the court stated that relevant to a showing of pretext,

would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful disruptive acts against it, but only if this criterion is applied alike to members of all races.

In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the court stated that

while Santa Fe may decide that participation in theft of cargo may render an employee unqualified for employment, this criterion must be 'applied alike to members of all races,' and Title VII is violated if, as petitioners allege, it was not.

In *McDonald*, the court rejected the company's argument that the principles of *McDonnell-Douglas* are inapplicable when discharge is based on serious misconduct or crime directed against the employer. The court stated:

The act prohibits *all* racial discrimination in employment without exception for any group of particular employees, and while crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination.

It is clearly erroneous for the District Court and the Court of Appeals to create the new, more difficult standard of requiring that a precisely identical disciplinary situation be found in order to show pretext. This requirement of "identical situation" sharply narrows the Congressional intent that Title VII is to remove artificial,

arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications. The "identical situation" standard would make an already difficult burden for petitioners in disparate treatment cases insurmountable unless precise equivalence of culpability can be established in that rare case. In Petitioner's case, he was the only Spanish-surnamed person (also, no blacks held such position) in the crew clerk's office, whose total staff was fifteen (15) in number, a small group from which to seek an identical situation. During the trial, Mr. Stanchfield, Assistant to the Superintendent, testified that many claims were filed with Santa Fe for a variety of reasons, and a Santa Fe official may investigate the claim by going to a clerk and asking the clerk what happened, or at other times the official may ask for statements in writing. He testified that there is no set of disciplinary rules on punishment and that charges of misconduct are handled on a case-by-case basis. Such case-by-case handling of disciplinary situations by the company lends itself to arbitrary decision-making and creates an even greater difficulty of finding an "identical situation" in which to find pretext.

At the trial, evidence was presented of intentional acts of theft by whites, discriminatory attempt to permanently place a relative by a white supervisor, falsification of time cards, and those employees remained within the present employment of Respondent. Petitioner has argued that those acts of misconduct were of a far more serious nature than his alleged act of misplacement on one (1) day, July 11, 1977. Clearly, this is evidence of discriminatory intent by Respondent.

II.

Certiorari Should Be Granted Because Petitioner Met the Ultimate Burden of Showing Discrimination When the Respondent Can Provide No Legitimate Business Justification for Imposing Harsher Punishment on a Minority Who Was Active in Civil Rights, Who Had EEOC Charges Pending Until After He Was Terminated, and Who Allegedly Was Found to Have Acted Improperly on One (1) Day, While the Respondent Imposed Lesser or No Discipline on Non-minority Employees Who Engaged in More Serious Infractions and Who Remain Presently Employed by Respondent.

McDonnell-Douglas Corp. v. Green, supra, sets forth the order of proof in a disparate treatment case. In the second stage, the employer must articulate some legitimate non-discriminatory reason for his actions. If the employer provides such reason, then the employee must show that said reason was pretextual. Without repeating the facts stated above in the Statement of Case and Facts and the arguments above, Petitioner contends that the evidence showed that others who had engaged in wrongdoing were similarly situated or guilty of worse wrongdoing than he allegedly was for that one (1) day in question, and therefore Respondent never provided a legitimate business justification for its actions. It is beyond comprehension why acts of misconduct by whites should be justified while Petitioner should be terminated for the one (1) day in question. Such disproportionate punishment makes a mockery of Title VII's attempt to provide equal protection. In footnote No. 11 of *McDonald v. Santa Fe Trail Transportation Co.*, supra, the court stated:

As we indicated in *McDonnell-Douglas*, an allegation that 'other employees involved in acts against [the employer] of comparable seriousness . . . were never-

theless retained . . . is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely pretextual, 411 U.S., at 804 (emphasis added).'

CONCLUSION

By applying the more onerous standard of looking for an "identical disciplinary situation," the lower federal courts have changed the existing standard of examining comparable seriousness of disciplinary actions in disparate treatment cases. This is in direct conflict with the standards set forth in prior Supreme Court cases, and therefore this Court should grant review. Furthermore, the Respondent has not shown a legitimate business reason for retaining other non-minority employees who engaged in misconduct of comparable or of a more serious nature; evidence of discrimination should be inferred. This Court should review why the lower federal courts failed to make such a finding. Petitioner respectfully requests that a Writ of Certiorari be issued and that this case be heard by the Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was mailed, first-class, postage prepaid, on the 15th day of February, 1984, to the following named counsel of record for Respondents:

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ROBERT L. SHIRKEY

APPENDIX

APPENDIX "A"

(Filed November 21, 1983)

NOT FOR ROUTINE PUBLICATION

(See our Local Rule No. 17)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-1958

MARSHALL L. PECINA,
Appellant,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY, and BROTHERHOOD OF RAILWAY,
AIRLINE AND STEAMSHIP CLERKS,
Appellees.

Appeal from the United States District Court
for the District of Kansas
(D.C. Civil Action No. 80-2063)

Robert L. Shirkey (James M. Slone and Henry M. Stoevers,
with him on the brief), Kansas City, Missouri, for
Appellant.

Ronald A. Lane, Chicago, Illinois (Roth A. Gatewood,
Topeka, Kansas, with him on the brief), for Appellee,
The Atchison, Topeka and Santa Fe Railway Company.

Before HOLLOWAY and McWILLIAMS, Circuit Judges,
and KERR, District Judge*

McWILLIAMS, Circuit Judge.

Marshall L. Pecina brought the present action under Title VII, 42 U.S.C. § 2000e, against his employer, the Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as Santa Fe, and against his collective bargaining representative, the Brotherhood of Railway, Airline & Steamship Clerks, alleging that his discharge was in retaliation for his civil rights activities and as a result of discrimination based on his Hispanic national origin. A three-day trial to the court resulted in a judgment in favor of the defendants. Pecina appeals. We affirm.

Pecina was hired by Santa Fe in 1951 as a laborer. His employment continued until November 17, 1977, on which date Santa Fe, after full hearing, terminated his employment. At the time of his discharge, Pecina was employed as a crew clerk at Santa Fe's Argentine Yard in Kansas City, Kansas, and, as such, was responsible for assigning engineers, firemen, and hostlers to work on engines in and around Kansas City. Pecina's brother was hired by Santa Fe in the spring of 1977, initially as a switchman and later as a fireman. As a result, Pecina was in a position to assign his brother to various jobs in and around Santa Fe's Argentine Yard.

During the summer of 1977, several Santa Fe firemen noticed that Pecina's brother appeared to be working jobs they believed they were entitled to by virtue of their greater seniority. They complained to management and their union representatives. An investigation ensued and

*Honorable Ewing T. Kerr, United States District Judge for the District of Wyoming, sitting by designation.

crew sheets and payroll records were examined. The investigation revealed four instances where Pecina's brother had been paid for unnecessary fireman jobs on the brother's rest days from his regular hostler assignment, when he had not been released from his hostler job and when his seniority would not permit him to work as a fireman. Thereafter, a formal hearing followed at which Pecina appeared and participated. Pecina was represented by a union official. The superintendent who was presiding at the hearing concluded that Pecina and his brother had engaged in a scheme to provide the brother with job assignments to which he was not entitled and that their acts were intentional. The superintendent based his decision on one specific date on which he held the wrongdoing was conclusively established. It was on this basis that management terminated Pecina's employment, as well as that of his brother.

As indicated, this was a trial to the court, Pecina calling thirteen witnesses and Santa Fe calling nine. The district court took the case under advisement, and later issued a twenty-five page unpublished Memorandum and Order. In essence, the district court held that Pecina had failed to make a *prima facie* case of either retaliatory discharge or discharge based on discrimination because of national origin. Alternatively, the district court held that assuming Pecina had established *prima facie* either retaliation or discrimination, the employer Santa Fe, had established a valid, non-retaliatory, non-discriminatory reason for its employment decision, and that the reason was non-pretextual and was, under all the circumstances, justified and non-disparate in character.

We need not here concern ourselves with the question of whether Pecina made a *prima facie* case of retaliation or discrimination. *United States Postal Serv. Bd. v. Aikens*,

..... U.S., 103 S. Ct. 1478 (1983), decided subsequent to the district court's resolution of the present case, holds that where a civil rights suit is fully tried on the merits, as it was here, it is unnecessary to address the question of a *prima facie* case, and the court should proceed to the ultimate question of whether there was, in fact, discrimination or retaliation. *Id.* at 1482.

As stated, the district court, by its alternative finding, held that Santa Fe's employment decision to terminate Pecina's employment was for a valid, non-retaliatory, non-discriminatory reason which, under the circumstances, was justified and non-disparate in nature. Pecina's main argument for reversal is that the record does not support the district court's alternative finding and is clearly erroneous. We disagree.

Under Federal Rules of Civil Procedure 52(a), an appellate court must uphold a district court's findings of fact unless "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). To do otherwise would inject us into the fact-finding process, which is not our prerogative. *Zenith Radio Corp. v. Hazeltine*, 395 U.S. 100, 123 (1969); *Williams v. Colorado Springs, Colo. School Dist. #11*, 641 F.2d 835, 843 (10th Cir. 1981).

A Title VII suit has essentially three stages of proof. The plaintiff has the burden of establishing a *prima facie* case of employment discrimination under the four-element test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If the plaintiff succeeds in meeting this burden, the defendant must "articulate some legitimate, non-discriminatory reason for the employee's rejection." *Id.* at 800. If the defendant carries this burden, then the plaintiff must show that the articulated reason was a pre-

text for discrimination. *Id.* at 804. The Supreme Court has made it clear that the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

With respect to the plaintiff's claim that defendant discriminated against him because of his national origin, the trial court found that the defendant articulated a legitimate non-discriminatory reason for discharging him. The record indicates that Pecina was dismissed because he used his position to assign his brother to work which, based on seniority, should have gone to others. Fellow employees instigated the investigation of this charge. Santa Fe work records indicated four dates on which Don Pecina was assigned either unnecessary fireman jobs or jobs which should have been performed by more senior employees. The formal hearing afforded Pecina clearly revealed an improper placement on July 11, 1977, and the pattern was such as to permit the inference that this was an intentional scheme to obtain extra money.

The appellant argues that evidence was presented showing many instances of employees intentionally violating company rules but not being discharged. The record indicates, however, that there was no evidence of an identical situation where an employee intentionally defrauded the company as Pecina did. We agree with the trial court that the evidence showing instances when lesser discipline was imposed upon employees for rule violations fails to establish that the railroad's stated reason for terminating Pecina was mere pretext. We note that a plaintiff may meet the ultimate burden of showing discrimination by one of two ways. A plaintiff may meet the burden directly by persuading the court that "a discriminatory

reason more likely motivated the employer." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). He may also do so indirectly "by showing that the employer's proffered explanation is unworthy of credence." *Id.*; *United States Postal Serv. Bd. v. Aikens*, U.S., 103 S. Ct. 1478, 1482 (1983). The district court decided the employer's explanation of its motivation was more credible and the record fully supports this decision.

Appellant also claims that he was terminated in retaliation for his civil rights activities. The basic allocation of burdens and order of presentation in a Title VII case alleging national origin discrimination as set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) are also applicable to retaliation claims. *Burrus v. United Telephone Co.*, 683 F.2d 339, 343 (10th Cir. 1982); *Wornack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981). The trial court concluded:

Aside from agitating a strained relationship between management, crew clerks, and those employees calling for jobs, the misplacement exposed Santa Fe to financial losses in claims from senior firemen. Given the willfulness of the violations, the deterrent effect of a discharge itself would have been sufficient justification. While Title VII evidences a strong policy of protecting persons who file or aid the processing of discrimination complaints, an individual active in civil rights may not act with impunity.

We agree with the trial court that, considering the totality of facts and circumstances, including Pecina's employment record, the plaintiff failed to prove that Santa Fe's action was in retaliation for his civil rights activities. We note that the civil rights activity which Pecina asserts was the primary basis for his retaliatory discharge oc-

curred in 1974. He was terminated in 1977, three years later, and only after co-workers complained of his mishandling of his crew clerk's duties, and after a formal hearing was conducted. The causal link between his protected activity and his discharge was not shown at trial.

We note that Pecina's complaint under the labor contract was later submitted by his union to the National Labor Adjustment Board pursuant to the Railway Labor Act. The Board eventually held that there was substantial evidence to support Santa Fe's conclusion that Pecina had intentionally violated company rule, and that, in view of his prior disciplinary record, discharge was warranted.

Pecina makes minor complaint over the district court's refusal to admit in evidence certain EEOC records. Such is *de minimus*.

Judgment affirmed.

APPENDIX "B"

(Filed June 30, 1982)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

CIVIL ACTION

No. 80-2063

MARSHALL L. PECINA,
Plaintiff,

v.

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY and BROTHERHOOD OF RAILWAY,
AIRLINE AND STEAMSHIP CLERKS,
Defendants.**

MEMORANDUM AND ORDER

This is an employment discrimination case brought under 42 U.S.C. §2000e, *et seq.* (Title VII). Plaintiff is a Spanish-surnamed person who claims he was discharged in retaliation for his civil rights activities and because of his national origin. Trial to the court commenced March 1, 1982, and covered a span of three days. After considering all the evidence, arguments of counsel, memoranda, and proposed findings of fact and conclusions of law submitted by the parties, the court renders the following decision.

Findings of Fact

1. Plaintiff, Marshall Pecina, is a 45-year old Spanish-surnamed person. In 1951 he was hired by defendant,

The Atchison, Topeka and Santa Fe Railway Company (hereafter Santa Fe).

2. Defendant Santa Fe is an interstate carrier by rail, operating a railroad yard at Argentine, Kansas.

3. Defendant Brotherhood of Railway, Airline and Steamship Clerks is a labor union and was the collective bargaining representative for plaintiff during the time relevant hereto.

4. Plaintiff's first job with Santa Fe was as a laborer. Shortly thereafter, he took a job within the clerical division, remaining under such classification for the duration of his employment.

5. In 1968 or 1969, plaintiff exercised his seniority and began working in the crew clerk's office.

6. The crew clerk's office is responsible for assigning the proper employee to the proper job. The position is necessary because collective bargaining agreements provide for classifying the positions, setting the rate of pay, and determining who has priority in the order in which jobs are assigned. Under the terms of the collective bargaining agreement, priority in job placement is determined by seniority. Because the rate of pay and working conditions differ significantly with the job assignment, employees pay close attention to their placement and the available jobs. To be eligible for a particular job an employee must submit a bid prior to the established deadline. Crew clerks then review the bids to determine who should get what job according to the employees' seniority. Some jobs are classified as "must fill" positions and may require a "forced assignment" if no employees bid for that job. If an employee is force-assigned to a position and wants to transfer to another job, he must submit a release and

when a junior employee becomes available, the employee seeking the release will be taken off that job. Depending on the bids and releases on file and the number of trains running, the assignment of jobs can involve a substantial number of employees. If the wrong employee is assigned to a job, all senior persons bidding on that job can file a claim and the railroad will have to pay each employee's lost wages.

7. In the early 1970's, a new collective bargaining agreement went into effect requiring a crew clerk to spend a substantial amount of time reviewing standing bids and placement under the new guidelines.

8. Position 6170, Crew Clerk, was declared vacant and advertised for bids on November 8, 1973. The duties were set out as:

Assist in implementation of new enginemen's agreement, particularly initiation of new standing bids, must be familiar with work agreements and handling of engineers, firemen and hostlers, calling crews, and any other duties that may be assigned. Assist other crew clerks when necessary.

9. Plaintiff successfully bid for the job and was permanently assigned to Position 6170 effective November 15, 1973.

10. On November 14, 1973, plaintiff was involved in an altercation with another crew clerk, J. Hanson, over matters unrelated to their duties. A formal investigation was held November 27, 1973, with the nature and extent of the altercation being in dispute. After conducting the investigation, Superintendent H. L. Rogers assessed crew clerks Hanson and Pecina thirty demerits each for their involvement in the incident.

11. As employees and crew clerks became more familiar with the new contract, less time was needed for reviewing standing bids for assignment of jobs and management began considering abolishing Position 6170.

12. In the spring and early summer of 1974, plaintiff, active in civil rights since the early 1970's aided Mrs. A. Shields, a black female, in processing an EEOC complaint.

13. Plaintiff discussed affirmative action programs at Santa Fe with management on June 11, 1974.

14. On June 12, 1974, a notice was posted that Position 6170 was abolished effective June 19, 1974.

15. Plaintiff filed a charge of discrimination with the EEOC on June 13, 1974, alleging that his employer abolished his current position in retaliation for assisting other employees in filing Title VII complaints and for discussing affirmative action plans with management

16. Plaintiff also complained about his job abolishment through his union.

17. The notice to abolish Position 6170 effective June 19, 1974, was cancelled June 18, 1974, because the collective bargaining agreement prevented abolishment of a position in which overtime was being worked. Since plaintiff's position at that time incurred overtime, it could not be abolished without violating the collective bargaining agreement.

18. Plaintiff suffered no interruption in work or pay since the abolishment was cancelled.

19. The EEOC notified Santa Fe by a letter dated June 25, 1974, that plaintiff had filed a complaint alleging employment discrimination.

20. On June 25, 1974, plaintiff tendered a letter to management requesting consideration for the position of chief clerk to the trainmaster.

21. On July 3, 1974, plaintiff met with Mr. Briscoe, general manager for the eastern line, and discussed minority opportunities and problems within Santa Fe. Mr. Briscoe spent the better part of the day discussing these problems with plaintiff and came away with the opinion that plaintiff was an intelligent employee with good potential and considered promoting him to a job where he could more effectively channel his energies.

22. On July 5, 1974, plaintiff was informed that he was considered as a candidate for the position of chief clerk to the trainmaster, but that the position had gone to another.

23. On November 30, 1974, management was informed that plaintiff had gone to the mechanical department on the pretext of clarifying some standing bids when in fact Mr. Pecina was soliciting signatures for a union matter. No formal investigation was called and no discipline was assessed.

24. Management transferred the overtime of Position 6170 to another position and on December 6, 1974, issued a notice that Position 6170 would be abolished effective December 13, 1974.

25. No union grievance or EEOC complaint was filed by plaintiff on this job abolishment. Plaintiff exercised his seniority and took another crew clerk's position within the crew clerk's office.

26. Plaintiff was assessed five demerits for failure to properly call a crew on January 24, 1975. Plaintiff acknowledged the discipline and waived a formal investigation.

27. Superintendent Rogers received a letter complaining about Mr. Pecina's attitude in the crew clerk's office on May 21, 1975. No formal investigation was conducted.

28. On May 27, 1975, Superintendent Rogers received a memo from Mr. Kurtz, trainmaster at Argentine, explaining a conversation Kurtz had with plaintiff on May 12, 1975, concerning plaintiff's poor work attitude.

29. Near the end of July 1975, Superintendent Rogers received a letter from the telephone exchange concerning problems with plaintiff.

30. Superintendent Rogers advised plaintiff by letter of July 31, 1975, about the policies regarding the telephones and that any questions should be directed to his supervisor for clarification.

31. During August of 1975, the working relationship in the crew clerk's office between Margaret Matthews, another crew clerk, and plaintiff deteriorated to a point where management found it necessary to bring Matthews and plaintiff in for a discussion. Management attempted to resolve the matter with an airing of grievances by the parties. The meeting was only partially successful and Matthews and Pecina were informed that further evidence of "noncorporation" would be handled through a formal investigation.

32. In November of 1975, plaintiff accepted a bid over the telephone. Plaintiff was informed by management that telephone bids were improper and would not be accepted because of the lack of documentation.

33. Plaintiff was offered a promotion to the position of chief clerk to trainmaster in Chicago, Illinois, Corwith Station. By letter of January 10, 1976, plaintiff turned down the promotion citing community ties and increment in

pay as the reason. Plaintiff did, however, express a desire to be considered for a promotion in the Argentine District in Kansas City, Kansas, if a position became available.

34. In January of 1976, plaintiff's son, David Pecina, who also works for the railroad, was called into Mr. Kurtz's office to discuss the number of demerits he was carrying. At that time David Pecina had incurred fifty demerits for discipline, with sixty being the number at which an employee is terminated. Plaintiff intervened on behalf of his son and informed Mr. Kurtz that one of the incidents for which his son was assessed fifteen demerits resulted from plaintiff's failure to inform his son that he had been called to work. Upon hearing this explanation Mr. Kurtz removed fifteen demerits from David Pecina's disciplinary record.

35. In April of 1976, plaintiff requested time off to be present at his wife's court appearance. The request was on very short notice and after ascertaining the nature of the request, management permitted plaintiff to mark off and called another employee to handle his position.

36. On August 25, 1976, plaintiff filed an amended EEOC complaint concerning his job abolishment of 1974.

37. By October of 1976, W. C. Spann had replaced Mr. Rogers as superintendent at the Argentine rail yard in Kansas City, Kansas.

38. Plaintiff was involved in an altercation with a G. P. Gore on October 16, 1976. Such an incident could be grounds for discharge; however, rather than seek a discharge, Superintendent Spann assessed thirty demerits to plaintiff and Gore. Plaintiff acquiesced to the demerits and the formal investigation was cancelled.

39. On December 24, 1976, there was some confusion as to whether plaintiff was to report to work or not. Plaintiff's version of the conversation differed materially from his supervisor's. A formal hearing was convened to determine if company rules had been violated. After reviewing the matter, Superintendent Spann concluded that the versions of the incident differed considerably, but were not conclusive, and decided the investigation should be closed with no discipline.

40. On May 16, 1977, management received a letter complaining about plaintiff's response to an inquiry by an employee. No investigation was made nor was discipline assessed.

41. In the spring of 1977, plaintiff's brother, Don Pecina, was hired by Santa Fe. Santa Fe was aware that Don Pecina was plaintiff's brother.

42. Don Pecina was hired as a switchman. After one month he became a brakeman, and in June or July was qualified as a fireman.

43. These advancements occurred because the railroad had a shortage of men at that time and the collective bargaining agreement provided for such advancements. Don Pecina learned about advancement opportunities by studying the collective bargaining agreement and also through plaintiff, his brother, explaining how the system worked.

44. During the summer of 1977, a number of firemen observed Don Pecina working jobs which they thought they were entitled to. Some of the firemen personally contacted plaintiff for an explanation, but failed to receive any. Other firemen, who had previously had difficulty in dealing with plaintiff, went directly to their union representative to complain.

45. The firemen believed that Don Pecina was working jobs which they were entitled to and that Marshall Pecina was intentionally favoring his brother by awarding him those positions. These complaints were brought to management's attention through the union representative.

46. Boyd Johnston, trainmaster at Argentine, became aware of these complaints and directed C. S. Metz, chief clerk to the trainmaster, to investigate these matters. Mr. Johnston had been trainmaster at Argentine since March 15, 1977, replacing J. Sullivan who had previously taken Mr. Kurtz's position.

47. Ms. Metz's initial investigation of the records in the crew clerk's office did not reveal any discrepancies. However, the firemen continued to complain so the union persisted in trying to rectify the grievances.

48. A meeting was held with the complaining firemen, the union representative, and assistant trainmaster Teal, now deceased. The firemen specifically complained about plaintiff's abusive attitude toward them and that Don Pecina was working jobs they were entitled to.

49. Ms. Metz was then directed to investigate the records again to determine if Don Pecina was being improperly assigned. Ms. Metz acquired payroll records for all the firemen during the months of June and July of 1977.

50. After reviewing payroll and other available records, Ms. Metz found four specific dates for which she could not substantiate how Don Pecina became entitled to work the positions he was paid for. Although Ms. Metz reviewed the records of all firemen, Don Pecina was the only individual whose records did not reflect his move-

ment among jobs. Plaintiff was the crew caller on duty in each instance where the records failed to explain how Don Pecina was entitled to the jobs he worked. Since these irregularities indicated violation of rules and procedures in job assignment, Ms. Metz took her findings to the superintendent.

51. Superintendent Spann reviewed the findings of Ms. Metz and decided to convene a formal investigation to address the problem.

52. Don Pecina was charged with violating a number of rules on July 11, July 18, August 23, and September 7, 1977. Marshall Pecina was also charged with violating company rules for these same four dates. Gary Guidicessi, a Caucasian, was charged with rule violations on July 18, 1977, because the records were not clear whether Mr. Guidicessi or Mr. Pecina would have called Don Pecina for the job on that particular date.

53. A hearing was held on October 26, 1977, and all employees were represented by union representatives.

54. Don Pecina's defense was that he had received telephone calls from the crew clerk's office to work these specific assignments. Under the collective bargaining agreement he was not permitted to question or interpret the assignments, but was required to show up for those assignments. Don Pecina stated that he had received phone calls telling him to go to those positions and he had simply gone.

55. Gary Guidicessi's defense to the charge he violated rules on July 18, 1977, was that the job that Don Pecina went to was a regular position that would be assigned by a notice posted on a bulletin board and Don Pecina would not have been called by telephone.

56. Marshall Pecina's defense was that he may or may not have called his brother for assignments on those dates, but that the jobs which Don Pecina worked were valid assignments and that because of the confusion and workload in the crew clerk's office, proper documentation was not made. Plaintiff's evidence was that other crew clerks had made errors in calling crew members and occasionally forgot to document an employee's move. Additionally, plaintiff alleged that the investigation was a personal attack on him and that management was out to get him because of his national origin and civil rights activities.

57. Management's evidence was that Don Pecina had worked positions that were not substantiated by any documentation and that they could find no reason for him working those jobs. Don Pecina would work a hosteling position on his regular five-day shift, and then on his rest day would be assigned to another job. When his rest days were up he would return to his regularly assigned hosteling job. Management also had other instances where the movement by Don Pecina to a higher paying job and then back to his regular position did not appear proper from the records. In all of these instances, plaintiff would have called the crew in which Don Pecina was improperly placed.

58. Superintendent Spann waited until he had received a transcript of the hearing and reviewed it carefully prior to making his decision. Finding the evidence conclusive and without doubt, Superintendent Spann ruled that on July 11, 1977, plaintiff had improperly placed his brother. Given the pattern of dates worked and the movement among jobs by Don Pecina when his brother was the crew caller, Superintendent Spann was of the opinion that plaintiff and his brother were involved in a scheme to receive more money by working jobs that Don wasn't entitled to or that were unnecessary. Neither Gary Gui-

ness nor plaintiff was found guilty of improperly calling Don to a job on July 18, 1977, because the job would be assigned by a bulletin board notice, not a phone call. The necessary inference was that Don had been untruthful about being called for the job and had placed himself on duty. Believing there was an intentional violation of company rules by plaintiff and Don, Superintendent Spann decided to dismiss the brothers.

59. The union sought a reconsideration, but Superintendent Spann reaffirmed his decision.

60. The union, believing there were procedural defects and insufficient evidence, appealed this grievance to the full extent of their collective bargaining agreement. The final arbitrator's decision upheld the discharge, finding substantial evidence to support the charges and that a fair and impartial decision had been reached. Management's decision to terminate the employees under the circumstances was found to be warranted.

61. On November 17, 1977, plaintiff filed an EEOC complaint amending the charge previously presented on July 13, 1974, to add the allegation that his employer had continued retaliation against plaintiff, specifically by terminating plaintiff and his brother while Gary Guidicessi, a Caucasian crew clerk charged with the same offense, received no punishment. This allegation was somewhat misleading since Guidicessi was charged with only one date and neither he nor plaintiff were found to have violated rules on that day.

62. On December 5, 1977, the EEOC issued a determination letter stating there was reasonable cause to believe the charge of retaliation for the 1974 job abolishment and invited defendant to enter into negotiations. This determination made no mention of the fact the job abolishment had been canceled and the issue had become moot.

63. In February and March of 1978, management extended to plaintiff an opportunity to return to Santa Fe on a leniency basis. The offer was similar to those made to other employees. This offer would have permitted plaintiff to return to work for Santa Fe and take any position which his seniority would entitle him to except in the crew clerk office. Additionally, plaintiff would be free to pursue his union and civil rights grievances. In view of the difficulties a number of employees had in dealing with plaintiff, the limitation from working in the crew clerk office was reasonable.

64. After considering the jobs available to him, plaintiff rejected the offer to return to work for Santa Fe.

65. Fred Miller, head crew clerk during 1974 to 1977, had been told by Trainmaster Kurtz and Assistant Trainmaster Pitts that if he had anything derogatory on Marshall Pecina management would back him up. Mr. Kurtz conveyed this to Mr. Miller in 1975 or 1976, when Mr. Miller brought plaintiff's unsatisfactory work attitude to the attention of Mr. Kurtz. Mr. Pitts conveyed this statement to Mr. Miller in July or August of 1977. Mr. Miller's impression from these statements was that management would back him up for any insubordination within the crew clerk's office.

66. On November 29, 1978, the EEOC issued a determination letter that there was probable cause to believe the charge of discrimination and retaliation raised in plaintiff's 1977 EEOC charge.

67. Plaintiff was the only Spanish-surnamed person employed as a crew clerk on a regular basis from 1974 through 1977 at the Argentine division. There are approximately fifteen crew clerks employed at Argentine to cover three eight-hour shifts.

68. Historically, Santa Fe has employed a large number of Spanish-surnamed persons although their advancement prior to the civil rights movement in the late 1960's and early 1970's was limited.

69. There is no specific policy on the degree of discipline assessed for rule infractions at Argentine, Kansas. The discipline imposed is determined on a case-by-case analysis.

70. No crew clerk had previously been discharged for improperly placing an employee. The general discipline for improperly placing an employee had been a verbal warning, a reprimand, or demerits placed on the crew clerk's record. However, prior to the incident involving plaintiff's misassignment of his brother, management had never encountered a situation where a crew clerk *intentionally* misassigned another employee for personal gain.

71. Both parties submitted evidence of allegedly comparable situations. Plaintiff presented a number of situations in which an incident occurred and no discipline was assessed, or a less severe penalty was imposed. Defendants presented evidence illustrating a number of situations where demerits were assessed or termination was involved. There were a substantial number of incidents where an employee who had been terminated was subsequently rehired on a leniency basis three to twelve months after his termination.

72. There is no discernible pattern of management's convening investigations or imposing discipline which would indicate that plaintiff's national origin or his involvement in protected Title VII activities entered into the discipline assessed against plaintiff in this instance.

Conclusions of Law

1. Jurisdiction and venue of this Title VII action properly lie in this court.

2. Plaintiff has exhausted all procedural prerequisites to bringing a Title VII action.

3. Defendant Santa Fe is an "employer" within the meaning of the statutory definition contained in Title VII, 42 U.S.C. §2000e(b). Plaintiff is an "employee" protected by Title VII as defined in 42 U.S.C. §2000e(f).

4. Title VII of the Civil Rights Act of 1964 bans employment discrimination by employers on the basis of race, color, religion, sex or national origin in hiring, compensation, conditions of employment and dismissals. 42 U.S.C. §2000e, *et seq.*

5. Title VII makes it an unlawful employment practice for employers subject to its provisions to discriminate against an employee "because he has opposed any practice made an unlawful employment practice" by Title VII. 42 U.S.C. §2000e-3(a). This section is to be liberally construed. *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977).

6. Title VII also makes it an unlawful employment practice for an employer subject to its provisions to discriminate against an employee "because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing" under Title VII. 42 U.S.C. §2000e-3(a).

7. Plaintiff alleges both discrimination based on national origin and retaliation for his involvement in protected Title VII activities.

8. In ruling on a claim of retaliation this court subscribes to what was said in *Mitchell v. Visser*, No. 78-4189 (D. Kan., unpublished, 12/17/81):

To establish a claim of retaliation, a plaintiff must show: (1) protected participation or opposition under Title VII known by the alleged retaliator; (2) an employment action or actions disadvantaging persons engaged in protected activities; and (3) a causal connection between the first and second elements, that is, a retaliatory motive playing a part in the adverse employment actions. *Whatley v. Metropolitan Atlanta Rapid Transit Auth.*, 632 F.2d 1325 (5th Cir. 1980); *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43 (2d Cir. 1980); *Womack v. Munson*, 619 F.2d 1292 (8th Cir. 1980), cert. denied 450 U.S. 979 (1980); *Hochstadt v. Worcester Foundation for Experimental Biology*, *supra*. The order of proof for a retaliation action follows the rule established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and recently refined in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). See *Whatley v. Metropolitan Atlanta Rapid Transit Auth.*, *supra*; *Grant v. Bethlehem Steel Corp.*, *supra*; *Hochstadt v. Worcester Foundation for Experimental Biology*, *supra*; *Garrett v. Mobil Oil Corp.*, *supra*; *Gonzalez v. Bolger*, *supra*; *Brown v. Biglin*, 454 F.Supp. 394 (E.D. Pa. 1978). First, the plaintiff must prove a *prima facie* case of retaliatory treatment by a preponderance of the evidence. A plaintiff demonstrates a *prima facie* case by showing: (1) that he engaged in protected activity, i.e., he opposed or participated in Title VII proceedings; (2) that his employer was aware of the protected activities; (3) that he was subjected to adverse employment actions; and (4) that the adverse employment actions followed

his protected activities within such period of time that the court can infer retaliatory motivation. *Hochstadt v. Worcester Foundation for Experimental Biology, supra*; *Sutton v. National Distillers Products Co.*, 445 F.Supp. 1319 (S.D. Ohio 1978); *Brandington v. International Business Machines Corp.*, 360 F.Supp. 845 (D. Md. 1973), *aff'd*, 492 F.2d 1240 (4th Cir. 1974). If this burden is met, a mandatory presumption arises, which requires the court to enter judgment for the plaintiff if the defendant does not rebut the presumption. *Texas Dept. of Community Affairs, supra*. The burden then shifts to the defendant to set forth, through admissible evidence, a valid, nondiscriminatory reason for his treatment of the plaintiff. If the defendant does so, then plaintiff must show that the reason advanced by defendant is a mere pretext for the kind of discrimination forbidden by Title VII. It must be emphasized that the defendant bears only a burden of production and that the burden of persuasion remains always with the plaintiff. *Id.*

9. The issue of retaliation in a Title VII action is primarily one of intent and motive. *Romero v. Union Pacific Railroad*, 615 F.2d 1303 (10th Cir. 1980). Factors to consider include:

[T]he employer's conduct against other persons who have committed acts of comparable seriousness; the employer's prior treatment of the employee and its reaction to the employee's legitimate civil rights activities; and the employer's "general policy and practice with respect to [those that oppose or participate in Title VII proceedings]."

McDonnell Douglas Corp. v. Green, supra, at 804-05.

10. Plaintiff has failed to make out a *prima facie* case of retaliation for his involvement in protected Title VII activities. It is without question that plaintiff engaged in protected activities and that his employer was aware of these activities. Indeed, the evidence indicated that defendant gave careful attention to its treatment of plaintiff because he raised the issue of discrimination and possible legal action whenever Santa Fe took action which was not to his liking. However, plaintiff's grievances were not limited to minority problems since he also complained about inefficiencies, lack of recognition and work load. While he was subject to adverse employment action in being terminated, the evidence presented at trial failed to raise an inference of retaliatory motivation.

Since the early 1970's plaintiff had helped persons file EEOC complaints, discussed minority problems with management, and filed his own EEOC complaints in 1974 and 1976. However, the history of plaintiff's employment relationship does not reflect that defendant was "out to get" him. Plaintiff's record of discipline indicates that when he first started working in the crew clerk's office he received various disciplinary notations for errors. As time passed and plaintiff gained experience, the disciplinary notations for placement errors decreased accordingly. Since plaintiff's record indicates discipline for only two misplacements from 1973 to 1976, Santa Fe had ample cause for concern over four unexplained placements of plaintiff's brother during a two-month span in 1977. Furthermore, if defendant had been seeking to get rid of plaintiff because of his activities since 1974, there were numerous opportunities prior to 1977. This three-year interlude raises serious doubts about plaintiff's claim. Instances when management supported plaintiff are illustrated by defendant's tolerance of the problems within the

office between plaintiff and Ms. Matthews in August of 1975, Mr. Kurtz's removal of fifteen demerits from his son's disciplinary record in January of 1976 at plaintiff's request, defendant's assessment of thirty demerits against plaintiff for his altercation with G. P. Gore rather than terminating him in October of 1976, and defendant's resolution of the investigation concerning plaintiff's failure to report to work on December 24, 1976, in plaintiff's favor.

There was certain testimony which initially caused the court some concern. Fred Miller, head crew clerk, testified that Mr. Kurtz, in 1975 or 1976, and Mr. Pitts, Assistant Trainmaster in 1977, told him if he had anything specifically derogatory on plaintiff that management would back him up. These statements were clarified on cross-examination and came in response to Mr. Miller and other employees' complaints to management about plaintiff's work. Mr. Miller was instructed that management would back him on discipline for insubordination by any employee in his office, but it would have to be a specific incident and documented before action would be taken. Mr. Chennault, who had previously been a crew caller, testified that he had been told by Mr. Kurtz that Superintendent Rogers had told Kurtz he was out to get plaintiff because of his "pain in the ass civil rights meddling." However, the court is hesitant in giving this evidence much weight because of the inherent problems with testimony of this "double hearsay" nature. Additionally, Chennault left defendant's employment under less than favorable circumstances and was no longer working in the crew clerk's office when the investigation occurred. Finally, the comments would have been made prior to 1976, and when the investigation began in 1977 Mr. Kurtz and particularly Mr. Rogers had been gone for nearly a year. Any consideration the court has given to that testimony is far outweighed by

the previously discussed evidence concerning defendant's treatment of plaintiff and the fact Santa Fe was affirmatively trying to appease plaintiff by offering him a promotion to chief clerk to the trainmaster at the Chicago yard in January of 1976, and hiring his brother in the spring of 1977.

In view of the chain of events from 1974 to 1977, the court finds that plaintiff has failed to prove a causal connection between his protected civil rights activities and his termination from which a retaliatory motive may be inferred. The nexus is simply too attenuated.

11. Alternatively, even if it could be considered that plaintiff has presented a *prima facie* case, we find that defendant has articulated a valid nondiscriminatory reason for its action and that plaintiff has failed to prove the reason advanced is a mere pretext for retaliation. The investigation arose because firemen had difficulty in dealing with plaintiff and observed his brother on jobs they were entitled to. The determination that plaintiff had *intentionally* placed his brother on an improper job was affirmed through the union grievance procedure and supported by substantial evidence in the record. Although Superintendent Spann found the evidence conclusive on only one day, he was certainly justified, given the circumstances and pattern of dates, in believing there was collusion between plaintiff and his brother in a scheme to get more money from the company. Termination was a stern penalty, but this was not just an inadvertent mistake, as other crew clerk errors had been. The intentional violation of company rules in this instance could have resulted in grave repercussions. Aside from agitating a strained relationship between management, crew clerks, and those employees calling for jobs, the misplacement exposed Santa Fe to financial losses in claims from senior

firemen. Given the willfulness of the violations, the deterrent effect of a discharge itself would have been sufficient justification. While Title VII evidences a strong policy of protecting persons who file or aid the processing of discrimination complaints, an individual active in civil rights may not act with impunity. Management must be able to maintain some semblance of internal discipline and a stable working environment. In light of our previous discussion of plaintiff's employment record and defendant's treatment of plaintiff, we are unable to find the disciplinary action was a mere pretext. Management's action was an acceptable response to a violation of company rules. Therefore, having considered the totality of facts and circumstances, the court concludes that plaintiff has failed to prove by a preponderance of evidence any retaliatory action against him by his employer, Santa Fe.

12. To establish a claim of discrimination based on national origin plaintiff must, as in a retaliation case, satisfy the order of proof set forth in *McDonnell Douglas*, *supra*, and recently refined in *Texas Department of Community Affairs*, *supra*.

13. To establish a *prima facie* case of discrimination and disparate treatment under Title VII because of national origin, plaintiff must show the following elements: "(1) that the plaintiff was a member of a racial minority; (2) that he was qualified for the job he was performing; (3) that he was satisfying the normal requirements in his work; (4) that he was discharged; and (5) that after his discharge the employer assigned white employees to perform the same work." *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977); adapted from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

14. The court finds that plaintiff has failed to establish a *prima facie* case of discrimination based on na-

tional origin under Title VII. For plaintiff to prove his *prima facie* case he must prove he was qualified for the job he was performing and satisfying the requirements in his work. Plaintiff, by intentionally misplacing his brother, failed to satisfactorily perform his work. While plaintiff disputes that he intentionally misplaced his brother, we are satisfied that the circumstances surrounding the misplacement were sufficient for Superintendent Spann to reach such a conclusion.

15. Assuming *arguendo* that plaintiff did establish a *prima facie* case of discrimination based on national origin, the court finds that defendant articulated a legitimate non-discriminatory reason for terminating plaintiff. Plaintiff's evidence that other employees were disciplined in a different manner fails to establish that defendant's reason for termination was a mere pretext. There is no situation which is identical to the circumstances involved in this instance. We reject the EEOC's conclusion that the discipline imposed in the firemen's vacation pay investigation indicates retaliation or discrimination in plaintiff's termination. First, the large number of employees involved would be a very important concern in assessing discipline. Second, there is no indication of the degree of culpability of each participant. Finally, the three levels of discipline imposed suggests the company may vary the discipline depending on the individual's employment record. Similarly, we disagree with the EEOC's conclusion that the discipline imposed in stealing is not directly comparable to this situation. It is very relevant in a case such as this where an intentional violation took place. Our analysis does not end there, however, and we have considered the examples of comparable situations submitted by the parties. While the discipline imposed varied greatly, there is no indication that national origin was a

determining factor in plaintiff's case. These matters were determined by management on a case-by-case basis and the willfulness of the instant violation, coupled with the magnitude of problems it created, justified the decision to dismiss plaintiff.

16. Summarizing then, plaintiff has not shown by a preponderance of the evidence that defendant retaliated against him because of his activities in support of protected Title VII activities, nor has plaintiff shown by a preponderance of the evidence that defendant discriminated against him because of his national origin. The court finds that the reasons offered by the defendant for the actions taken against plaintiff were not a pretext to carry out a surreptitious policy of retaliation or discrimination. Accordingly, plaintiff is not entitled to relief.

17. In the event that any of the foregoing findings of fact also constitute conclusions of law, they are also adopted as conclusions of law. In the event that any of the foregoing conclusions of law also constitute findings of fact, they are also adopted as findings of fact.

18. Judgment shall be entered for the defendants and against the plaintiff on all of plaintiff's claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*

19. Defendants' request for an award of attorney's fees under 45 U.S.C. §2000e-5(k) will be denied. The court is not persuaded that "plaintiff's claim was frivolous, unreasonable or groundless, or that plaintiff continued to litigate after it clearly became so." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). *See also, Smith v. Josten's American Yearbook*, 624 F.2d 125 (10th Cir. 1980); *E.E.O.C. v. Fruehauf Corp.*, 609 F.2d 434 (10th Cir. 1980),

cert. denied 446 U.S. 965 (1980). Accordingly, an award of attorney's fees is not warranted.

Counsel for defendants are directed to prepare, circulate and submit an approved journal entry of judgment in accordance with the foregoing findings and conclusions.

IT IS SO ORDERED.

Dated this 30th day of June, 1982, at Kansas City, Kansas.

/s/ Earl E. O'Connor
Earl E. O'Connor, Chief Judge

APPENDIX "C"

42 U.S.C. Section 2000e-2(a)

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. Section 2000e-3(a)

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

FILED

MAR 17 1984

No. 83-1399

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARSHALL L. PECINA,

Petitioner,

VS.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY and BROTHERHOOD OF
RAILWAY, AIRLINE AND STEAMSHIP CLERKS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT SANTA FE'S BRIEF IN OPPOSITION

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<u>Name</u>	<u>Occupation</u>	<u>Circumstances</u>	<u>Date Removed From Service</u>	<u>Date Re- instated</u>	<u>Remarks</u>
Gardner, L L	Coach Cleaner	Theft of 6 cartons of sewer pipe from Frt Hse #1 - value \$252.	7-25-73	Was not	Has not requested reinstatement.
Regalado, V	Frt Handler	Theft of mdee from trailers at Frt Hse #3.	10-25-75	Was not	Board Award #21687 dated 8-31-77 denied request for reinstatement.
Gibson, R J	Switchman	Theft of Government forms from 2 locomotives 7-6-77 & from 6 locomotives 7-7-77.	8-04-77	Was not	Took to Board on 7-27-78. No word as to action taken.
Alexander, I E	Engineman	Appropriated several pieces of 2 x 8 lumber on R/W.	8-14-67	1-19-68	Now active employee.
Middleton, D F	Sig Mntnr	Appropriated Company property, and unauthorized use of Co. vehicle.	8-31-67	Was not	Denied bid for reinstatement.
Warren, W L	Ewa Gang Labr	Appropriated 65 lbs. of copper wire from Company.	8-13-73	1-8-74	Removed again 4-7-78 account absent without leave; reinstated 6-28-77, but never reported - resigned.
Fulley, R A	Brakeman	Stole blankets from Reading Room at Fort Madison 11-19-74.	11-21-74	Was not	Application was dis- approved.
Hammond, E L) Reeves, C A)	- Mach Oprs	Mechandise taken from a trailer at derailment site 6-3-77.	3-31-78	3-1-78	Excessive time lag between date of occur- ence & date of invest- igation & subsequent pension to warrant on 30 days suspension.

APPENDIX "D"

A33

<u>Name</u>	<u>Occupation</u>	<u>Circumstances</u>	<u>Date Removed From Service</u>	<u>Date Re-instated</u>	<u>Remarks</u>
Slaughter, M R	Exa Gang Labr- Truck Driver	Used SFE Universal credit card to purchase gasoline for personal use in private auto.	12-5-77	7-17-78	Now active employee.
Cook, D J	Clerk	Manipulation of demurrage records favor of SW Forest Industries in return for employing son.	2-20-73	4-02-73	Granted a disability annuity on 6-19-75.
Hessick, H E)	Switchman	Misappropriation of food-stuffs & other items from property of patrons at Turner industrial area.	1-15-74	6-25-74	Now active employee.
Sauka, J)	Switchman		1-15-74	6-25-74	Now active employee.
Rhoades, R P)	Switchman	(All in same investigation.)	1-15-74	6-25-74	Appl. for Disab. Ann.
Wilson, F)	Yd Engineer		1-15-74		Did not appear at investigation due to mental distress then was not located until letter dated 12-3-74 written to him at a Calif. address, advising him of re instatement. No word from him since.
White, C W	Trackman	Appropriated Company property.	1-18-74	Was not	Denied reinstatement.
Stroble, G D	Paint Gang Foreman	Applying paint to private residence during assigned hours of duty.	5-23-74	Was not	Later resigned on 8-9-76 Reinstatement denied. Stroble claimed injury, subsequent lawsuit, resigned.
Miller, M L)	Switchman	Removal & possession of	11-29-74	4-17-75	Now active employee.
Stubbs, D J)	Switchman	loading from a revenue shipment in car AT 621449 on 10-1-2,74.	"	4-16-75	Now active employee.

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<u>Name</u>	<u>Occupation</u>	<u>Circumstances</u>	<u>Date Removed From Service</u>	<u>Date Re- instated</u>	<u>Remarks</u>
Torres, I. P.	Exa Gang Fmn	Used Company credit card for purchasing gasoline for personal auto.	2-27-74	6-28-76	Now active employee.
Smith, K. G.	Mach Opr	Appropriated Company gasoline for personal use.	12-3-76	3-21-77	Now active employee.
Sizemore, C. A.	Trackman	Anpropriated Company radio pakset.	5-23-77	Was not	Rid for reinstatement was denied.
Madsen, L. J.	D&B Foreman	Unauthorized & illegal use of Company credit card.	1-21-78	7-25-78	Now active employee. No investigation held. Signed waiver for dismissal.
Weeks, R. L.	Trackman	Appropriated considerable Company property, such as pipe wrenches, etc., for personal use.	6-26-78	Was not	General Chairman requested reinstatement on 8-25-78 - denied.
Redmond, P. K.	Brakeman	Appropriated and sold Company owned scrap iron.	6-29-78	Was not	Has not sought reinstatement yet.
Smith, T. L.	Engineman	Used Conductor K. D. Wendlandt's SS No. to secure lodging at Salina when he (Smith) was not entitled to lodging.	12-23-74	6-22-75	Now active employee.
Wendlandt, K. D.	Conductor	Gave Engineman Smith his SS No. to secure lodging at Salina, since Engr Smith not entitled to lodging.	12-26-74	2-05-75	Now active employee.
Burgess, W. A.	Trackman	Appropriated Company barbed wire while working on Company fence.	9-25-73	Was not	Still off - not reinstated, and we denied reinstatement.

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<u>Name</u>	<u>Occupation</u>	<u>Circumstances</u>	<u>Date Removed From Service</u>	<u>Date Re-instated</u>	<u>Remarks</u>
Brown, J J	Trackman	Appropriated Company barbed wire while working on Company fence.	9-25-73	Was not	Still off - not reinstated. We denied him reinstatement. Public Law Board No. 1582 Award No. 51 also denied his claim for reinstatement.
Morgan, E L	Engineman	Appropriated Company diesel fuel for his personal use.	2-06-75	1-03-76	Now active employee
Smith, C R))	Eng Foreman	Appropriating lading & mds from commercial	3-15-75	None were	Public Law Board No. 1652 Award No. 4, dated Nov. 30, 1976, denied the 5 men's claim for reinstatement.
Moore, J O))	Yardman	shipments at Okla City between 4/7 and 4/17/74.		ever re-instated	
Abbott, G L))	Yardman				
Gray, G D))	Yardman				
Monsik, J F))	Yardman				
Oliver, L A	Track Pmn	Appropriating & selling Company scrap & ballast from 7-6-74 to 12-27-74.	4-16-75	10-24-75	Now active employee.
Wilton, G E	Track Pmn	Appropriated Company steel beams to use in remodeling his home.	11-14-75	4-13-76	Now active employee.
Talbert, K D	Brakeman	Appropriated Company property (locomotive) & operated on yard trackage at Sublette, Kansas, 8-12-76.	8-13-76		Sent letter by Surt. dated 1-6-77 advising of his reinstatement, but Talbert never responded.
Morgan, H O Jr	Student Pmn	Appropriated Company credit card for purchase of gasoline for personal auto.	5-13-77	9-30-77	

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<u>Name</u>	<u>Occupation</u>	<u>Circumstances</u>	<u>Date Removed From Service</u>	<u>Date Re- instated</u>	<u>Remarks</u>
Morgan, H O Jr	Gang Foreman	Used Company credit card for use in purchasing gasoline for personal vehicle (2nd offense)			Formal investigation set for 9-13-78, but postponed. He resigned from service.
Winfield, P F	Machine Opr	Appropriated a Company Weedeater machine & one case of oil, and sold same to raise money for personal use.	4-28-78	7-3-78	Now active employee.
Pearceall, D R	Laborer-Mech.	Attempted to remove old switch box in B&R Alda & use electrical switch box for personal gain, but received injury (electrical burn) to both hands.	12-26-75	12-14-76	Now active employee.
Lopez, S J	Trk Supvr	Appropriated several tools & various supplies & took to his farm near Maxwell, N.M.	2-06-76	8-02-76	Lopez was again removed from service on 9-21-77 as a result of reporting for duty after drinking several beers in a local bar at Raton in violation of Rule G. Was reinstated on 1-23-78 and is now an active employee.
Lopez, A D	Track Pmn	Used Company credit card to purchase gasoline for his personal vehicle on 11-3-77. Also claimed 8 hrs. worked on 10-7-77 when he was off duty that date.	2-01-78	7-05-78	Now active employee.

<u>Name</u>	<u>Occupation</u>	<u>Circumstances</u>	<u>Date Removed From Service</u>	<u>Date Re- instated</u>	<u>Remarks</u>
DeGay, W D	Trackman	Appropriated Company truck for personal use on 6-18-78, wrecked same to amount of \$2,000. Investigation held 7-21-78.	7-21-78	Was not	DeGay did not show up for investigation, and has not been heard from since date of incident.
Martin, J W	Train Baggage- man	Appropriated several items from baggage cars on passenger trains while working as train baggage man.	3-03-77	1-29-78	Now active employee.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARSHALL L. PECINA,

Petitioner,

VS.

**THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY and BROTHERHOOD OF
RAILWAY, AIRLINE AND STEAMSHIP CLERKS,**

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

RESPONDENT SANTA FE'S BRIEF IN OPPOSITION

Respondent, The Atchison, Topeka and Santa Fe Railway Company (hereinafter "Santa Fe"),¹ respectfully re-

¹ Respondent, The Atchison, Topeka and Santa Fe Railway Company, is a wholly owned subsidiary of Santa Fe Industries, Inc. which is a wholly owned subsidiary of Santa Fe Southern Pacific Corporation. Subsidiaries of respondent which are not wholly owned by it are as follows: Alameda Belt Line, The Oakland Terminal Railway, Oklahoma City Junction Railway Company, St. Joseph Terminal Railroad Company, and Sunset Railway Company.

quests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case.

STATEMENT OF THE CASE

Facts

Petitioner, Marshall L. Pecina was employed by respondent, Santa Fe, as a crew clerk in Kansas City, Kansas, and in this capacity was responsible for assigning engineers, firemen and hostlers to work on trains and locomotives in and around Kansas City. He was represented for collective bargaining purposes by the Brotherhood of Railway, Airline and Steamship Clerks.

In June, 1974, Santa Fe decided to abolish a job petitioner happened to be working because it required only a few hours work each day. After Santa Fe advised petitioner of its plans in this regard, he complained through his union. In response thereto, the position abolishment was postponed. Petitioner also filed a charge of discrimination with the EEOC claiming that Santa Fe was eliminating the job in retaliation for petitioner's civil rights activities, although Santa Fe was not served with a copy of the charge until after it postponed the abolishment. When the position ultimately was eliminated in December, 1974, petitioner exercised his seniority and acquired a similar crew clerk position with the same pay and hours. He suffered no injury as a result of the job abolishment and remained continuously in Santa Fe's employ as a crew clerk until 1977, despite having been involved during the interim in several confrontations with other employees for which he could have been but was not removed from service.

In July, 1977, petitioner's brother, Don Pecina, was hired by Santa Fe as a fireman and thereafter was in a position to be assigned by petitioner to various fireman and hostler

jobs. During the summer of 1977, several Santa Fe firemen noticed that Don Pecina appeared to be working jobs they believed they were entitled to by virtue of their greater seniority. Eventually, these employees complained to respondent and their union representatives that petitioner was improperly favoring his brother in making assignments and had been abusive and crude with them and their families on the telephone.

At the behest of the firemen and their union, Santa Fe conducted a preliminary investigation into the allegations of impropriety on petitioner's part. The results of the company's inquiry indicated that when petitioner had been on duty, his brother Don had been called and paid for four lucrative, yet unnecessary, fireman jobs on Don's rest days from his regular hostler job and when Don's seniority would not permit him to work as a fireman. A formal disciplinary investigation into the matter was then held at which petitioner was present, was given the opportunity to testify, produce evidence, cross-examine witnesses, and he did so. This proceeding lasted ten to twelve hours and generated a transcript of one hundred, twenty-two pages, plus exhibits.

After reviewing the evidence adduced, respondent's Superintendent concluded that petitioner and his brother had been engaged in a scheme to provide Don Pecina extra money. The Superintendent founded his decision concerning petitioner on a specific day on which his wrongdoing was indisputable and on the basis of which his discipline clearly would be sustained in arbitration. However, contrary to the statement in the petition (p. 3), petitioner never was exonerated for the other three days; the record below includes the consistent testimony of Santa Fe management that they became convinced the Pecina brothers were engaged in an ongoing scheme to collect money, but they based their disciplinary decision with respect to petitioner on a day when

the case against him was so clear they were confident it would be upheld in arbitration.

Immediately following his discharge, petitioner filed another charge of discrimination claiming retaliation and discrimination based on his termination. He also filed a grievance under the collective bargaining agreement.

During discussions between Santa Fe, petitioner and his union representatives regarding the grievance, management agreed to allow petitioner to return to work without back pay but subject to a restriction that he no longer work in the crew clerk's office. It was also agreed, however, that petitioner would be free to pursue through appeal procedures under the union agreement his claim for back pay and his claim to remove the restriction against his working in the crew clerk's office. Moreover, petitioner was not required to relinquish his claims under any civil rights laws. Petitioner repudiated this agreement despite the availability at the time of other jobs at the same location with wages, hours and working conditions comparable to or better than the crew clerk position he had previously held. Subsequently, petitioner's grievance was submitted for resolution through Railway Labor Act arbitral processes and, on December 14, 1979, was denied by the National Railroad Adjustment Board.

Proceedings Below

After he received a right to sue letter from the EEOC, petitioner brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, against Santa Fe and his union alleging retaliation and national origin discrimination. The case proceeded to trial in the United States District Court for the District of Kansas. Thereafter, the district court entered judgment based on a thorough but unpublished Memorandum and Order, reproduced as

Appendix B to the petition for certiorari. The court held that petitioner had failed to establish either a prima facie case of retaliation, because he did not prove any casual connection between his civil rights activity and his discharge, or a prima facie case of national origin discrimination, since he did not prove he remained qualified for his job. Alternatively, the court concluded that, even if petitioner had established a prima facie case, he did not prove that Santa Fe's reason for his discharge, i.e., that he had engaged in a scheme to obtain money from his employer, was merely a pretext for retaliation or national origin discrimination.

Petitioner appealed from the district court's decision to the United States Court of Appeals for the Tenth Circuit. After receiving the parties' briefs and hearing oral argument, the court of appeals affirmed the district court's decision. In an unpublished opinion, reproduced as Appendix A to the petition, the Tenth Circuit ruled the record disclosed no reason to conclude petitioner had carried his ultimate burden to persuade the trier of fact that respondent intentionally and unlawfully discriminated or retaliated against him.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Decision Below Does Not Establish A Standard Of Proof In Conflict With that Established In Any Other Circuit Or By This Court.

Petitioner has attempted to raise some conflict among decisions of the federal appellate courts, apparently regarding the order and burden of proof in disparate treatment cases under Title VII. In particular, petitioner argues that a new standard of proof was established below to the effect that a Title VII plaintiff must always produce evidence that another employee in "an identical situation" was treated less severely in order to show the employer's

stated reason for terminating him was pretextual. Pet. 5-7. Petitioner's assertions in this respect mischaracterize the lower courts' opinions.

It is clear that both the appellate and district courts scrupulously adhered to the framework for allocating the order and burden of proof in Title VII cases which this Court developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *United States Postal Service Bd. of Govs. v. Aikens*, 460 U.S., 103 S. Ct. 1478 (1983). Moreover, the courts below simply did not require petitioner to present "an identical situation". Neither court expressly or implicitly held that pretext for discrimination can never be established absent evidence that an employee in exactly the same situation as plaintiff was treated by the employer in a more lenient fashion.

To the contrary, the courts simply analyzed the evidence produced by plaintiff to determine whether it showed the articulated reason for petitioner's discharge was a pretext for discrimination or retaliation. The courts below agreed that the offenses involved in the disciplinary cases upon which petitioner relied were not comparable to petitioner's willful plan to defraud the company,² while the

² As the lower courts noted, there was ample evidence on the record to reach this decision. Indeed, the particularly calculated nature of petitioner's scheme, the broad impact it had on respondent's already volatile relations with other employees and unions, and the substantial pecuniary cost to respondent in the form of "time claims" filed by firemen denied jobs to which their seniority entitled them, all contributed to the especially serious nature of petitioner's offense. Given also that petitioner had once before been discharged for dishonest conduct (cashing another employee's payroll check), the lower courts hardly erred in concluding that petitioner's conduct was properly deserving of dis-

other discharges for willful misconduct placed in evidence by the employer were more comparable. *Cf. McDonnell Douglas, supra* at 804 (evidence that white employees were involved in acts against the employer of "comparable seriousness" to plaintiff's, but received less severe discipline, may indicate that the employer's articulated reason for disciplining plaintiff was pretextual). In so doing, the court of appeals did not invent any novel standard of proof but only evaluated the evidence in accordance with the standards and procedures laid down by this Court in *McDonnell Douglas, Burdine* and *Aikens, supra*.

Petitioner's conclusory claim that the court of appeals decision conflicts with decisions of other courts is wholly baseless; he has not directed this Court to a single decision from another court of appeals or from this Court which reflects any inconsistency with the ruling below. The conflict which he asserts does not exist.

II. Petitioner Merely Asks This Court to Review Concurrent Findings Of Fact By Two Courts Below.

Petitioner's second argument for certiorari (Pet. 8-9) exposes clearly the true substance of his petition. In the most general of terms, he quarrels again with the conclusion twice reached below that the examples of discipline which he cited at trial to show discrimination or retaliation were not persuasive. In so doing, he again omits reference to the numerous disciplinary cases identified by the employer which demonstrated that white employees found

discipline more severe than that issued employees in the instances relied upon by petitioner. In any event, the record disclosed numerous examples of employees who were discharged for willful misappropriation of railroad or shipper property. These latter cases were certainly more "comparable" to petitioner's and indicated that his discipline was not inordinate.

guilty of willful acts of dishonesty, also were discharged, and to the fact that, like others, he was offered reinstatement but he turned it down.

Still, regardless of the specific nature of the evidence adduced below, it is conspicuously apparent that the outcome of this case turned wholly on the evidence presented at trial. No controversial or important questions of federal law were or remain to be resolved.³ Rather, petitioner seeks one more opportunity to review the evidence presented in his case. That evidence, however, has been thoroughly considered by two federal courts coming to exactly the same conclusion. It is not the function of this Court to review such factual findings. Rather, this Court has repeatedly pronounced that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). No such showing of very obvious or exceptional factual error has been made by petitioner.

³ It is significant that neither the district court nor the Tenth Circuit regarded its opinion as possessing enough significance beyond the interests of the parties at bar to be worthy of publication.

CONCLUSION

For the reasons heretofor stated, the petition for writ of certiorari should be denied with costs allowed to respondent.

Respectfully submitted,

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